THE FORGOTTEN NINTH AMENDMENT / DIRECTORY OF AMERICAN JUDGES / FOUNTAIN OF JUSTICE

BOOK REVIEWS

THE FORGOTTEN NINTH AMENDMENT. By Bennett B. Patterson. Indianapolis: Bobbs-Merrill Co., Inc., 1955. Pp. 217. $4.00.

THE Ninth Amendment states that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." This amendment, which is the most general in the Constitution, reflects a deep-seated desire on the part of Madison and his supporters in Congress to secure certain common law rights against invasion by the central government. It passed the House and Senate with apparently no debate and, since its adoption, has evoked little significant comment. Hence, Mr. Patterson's adjective, "forgotten."

The reason for the amendment's comparative obscurity stems possibly from its clarity. It amounts to a mere assertion that, despite the fact that the Constitution expressly protects certain enumerated rights, there are others, usually referred to as "natural rights", which existed prior to its adoption and which should be equally safeguarded. For all practical purposes, the amendment amounts to nothing more than a restatement of the "inalienable rights" of the Declaration of Independence and the "inherent rights" of the Virginia Bill of Rights.

Strangely enough, it has never been construed by the Supreme Court. Mr. Patterson indicates that this omission is probably due to a mechanical error due to the Court's misnumbering of the Seventh as the Ninth Amendment in *Livingston* v. *Moore*, a case involving the right of trial by jury. It is obvious that the Court was confused due to the fact that the original Bill of Rights as proposed by Madison contained twelve articles, the first two of which were never adopted. However, it is undoubtedly the general—and even mythical—nature of the amendment that has prevented its construction rather than a numbering error in a case where it was not applicable in the first place. Furthermore, in view of the appropriateness of other provisions of the Constitution, it has been unnecessary to look to the nebulous Ninth for authority.

Mr. Patterson believes that the amendment could be profitably utilized for the protection of what he refers to as "rights of natural endowment" instead of overworking the due process clause of the Fourteenth Amendment. Possibly, he has a point, but it does not seem at this writing that the courts are willing to depart from traditional constitutional standbys to resort to the "unenumerated rights" of the Ninth which even Mr. Patterson finds difficult to define or catalogue. For my own part, I prefer to regard his forgotten amendment as a statement of principle which should properly have been included in the Preamble.

Lawyers will only find a portion of Mr. Patterson's slim book of professional interest. In his first sixty-two pages, he discusses the legislative and judicial history of the amendment in direct if not overly stimulating prose. He then rambles off into forty pages of platitudinous discussion of such topics as "The Importance of Being an Individual" which, while undoubtedly of interest to prospective Fourth of July orators, hardly advances the cause of legal scholarship. The last—and largest—portion of his book is a reprint of the Annals of Congress which covers the Congressional debate which preceded the submission of the Bill of Rights to the various states for ratification. This material is undeniably interesting and is probably sufficient excuse for publishing Mr. Patterson's effort in the first place.

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DIRECTORY OF AMERICAN JUDGES. Compiled and edited by Charles Liebman. Foreword by Roscoe Pound. Chicago: American Directories Corporation. Unpaged. 1955. $15.00.

UNTIL the appearance of the present volume, no comprehensive directory of American judges had existed. Judges are listed in general biographical works, in government manuals, court reporting services, but those scattered references are fragmentary in scope and detail. There is no "Martindale-Hubbell" for judges, and while physicians, artists, librarians, engineers, and educators are represented in specialized *Who's Who* series, judges are not. Now, the Directory of American Judges fills this void, causing us to wonder why it was not done a long time before. The need for it was never in doubt. It is bound up with the judicial structure of the country, which provides in the main for popular election of judges, and makes their selection a matter of civic interest.

The impending reform of our court system underscores this point. As Roscoe Pound states in the foreword, the trend is toward elimination of partisanship; selection of judges should be based more on their individual merits and less on their political affiliation. Wider knowledge of their personal background will become increasingly relevant to all citizens. The directory's usefulness as a general reference tool is evident. In our own specific sphere, attorneys will welcome a closer look at the "human side" of judges, and judges themselves will be interested in personal data of their professional kinsmen.

Every directory is as good as the responses to its questionnaires. The Directory of American Judges cannot be blamed for such omissions as exist, i.e., names of judges who refused to be listed or gave skimpy information. On the whole, it has notably succeeded in unearthing the personal history of thousands of judges, their vital statistics, marital status, education, professional and extra-professional activities, association memberships, length of term, manner of selection (election or otherwise), previous experience, official and private addresses. Listing is alphabetical by names. A useful and informative table of federal and state courts precedes the biographical section.

The story of judges tells incidentally the story of their courts. Aiming to include all courts of record, the compiler discovered that the real status of many lower courts was in doubt and that no authoritative decision, or even opinion, could be procured. In these cases, the compiler resorted to his own judgment and may have included courts which, by the strictest standards of selection, would have been left out. This, actually, enhances the value of the directory and is in line with its basic policy of broad comprehensiveness. The only other limitations it imposes on its scope, are the exclusions of Justices of the Peace and presiding officers of administrative tribunals. A relaxation of this rule, at least in regard to administrative tribunals, is contemplated in the quite probable event that the demand justifies a further edition.

This directory belongs in every legal library, regardless of its size. For university, law school and court libraries, it is a "must" for reference. Likewise, every attorney and every judge who acquires it, will draw considerable benefit from it.

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FOUNTAIN OF JUSTICE: A Study in the Natural Law. By John C. H. Wu. New York: Sheed and Ward. 1955. Pp. 287. $3.75.

The author, a former member of the Legislative Yuan of the Nationalist Government of China, has had a checkered career. He graduated from the Comparative Law School of China, and attended some of the best universities in Europe and America.

Upon his return to China, he became, first, professor of law and, later, Chief Justice of the Provisional Court of Shanghai. In 1946, he was appointed Minister Plenipotentiary to the Holy See. At present, he teaches at Seton Hall University Law School.

Drawing on his varied experiences as a lawyer, scholar and diplomat and on a wealth of cases and historical quotations, the author succeeds in furnishing the reader with a lucid and inspiring presentation of his "diffident" philosophy of law which flows both from "Christian faith and natural reason".

Since the book has been written not only to lawyers but also "to educated people with no special knowledge of the law", the writer finds it necessary to elaborate in his Prologue (pp. 1-54) on the nature and scope of law, including the distinguishing features of eternal, natural and positive laws. In so doing, he relies chiefly on the philosophy of St. Thomas Aquinas.

While eternal law is the "Plan of Divine Providence" and as such is "absolutely perfect", natural law is only "an imprint of the eternal law on the natural reason of man, which is finite and cannot be absolutely perfect." Human law, on the other hand, in its essential meaning is but "a compound of natural law and positive law." If human law is contrary to the law of nature, it can no longer be regarded as law but "a corruption of law." Thus an adequate definition of law must take account of "the essence as well as the end and the process of the law." Its essence is "conformity to reason", its end encompasses "the common good", and the process reflects "the gradual realization of its essence through a progressive attainment of the end, by means of legislation, promulgation, judgment and enforcement."

Following his introductory observations in regard to the meaning and aim of the law, Professor Wu devotes the first part of his book (pp. 55-154) to an analysis of the persistent characteristics of the common law in its old and new settings. He finds that from the viewpoint of its underlying philosophy, the common law has not drifted very far from the Christian tradition of the law of nature, since its idea of justice essentially follows the Christian ideology which insists upon the dignity and equality of the human person. The age of Bracton is indicative of the fact that the two fundamental characteristics of the common law, "the idea of the supremacy of law", and "the practical, concrete way of dealing with cases", came "from the wisdom of the Catholic Church." The common law, however, was not only founded on justice but "rooted in grace". Step by step, it assimilated the principles of natural law, "not as an abstract theory, but as vital practical rules of human conduct."

While Christopher St. Germain did not seem to represent the "scholastic tradition in its pure form", the hold of the scholastic philosophy on the common law was too strong even after the Reformation "to be entirely uprooted." Shakespeare had a deep sense of regard for "the dictates of natural reason", just as Holt profoundly respected the dignity and liberty of man. The law of nature had also left its imprint on the decisions of Lord Mansfield and on the attitude of Coke, for whom the eternal law, the law of nature, and the law of the land formed a "continuous series". In the course of later centuries, the natural law had gradually gone "underground" but the common law was too deeply embedded in Christianity to be separated entirely from the natural law tradition.

When the common law came to America, it grew "in breadth" while it retained its "original depth". Underlying the spiritual regeneration, cosmopolitan outlook and "immense self-confidence" of the colonists, there was "a deep faith in God and His justice." To the Puritans and their compatriots the laws of nature and of God were "no products of fancy, nor even mere ideals; they were absolutely *real,* infinitely more real than any human laws." The early days of American jurisprudence remind the author of the great days of the Magna Carta. Prior to the Declaration of Independence, "all that the colonists wanted was to be the inheritors of the common law,

the common law as Bracton, Coke, Holt, Mansfield and Blackstone understood it." Thus in its earlier phase of development, the American philosophy of the natural law remained attached to religion, and became "the rock on which a true democracy was built."

In the course of the nineteenth century, under the impact of the general trend of European thought, the philosophy of individualism, "in the sense that no one is his brother's keeper", entered into and dominated American legal thought. Legal positivism began "with the denial of the natural law, and has ended by creating strange gods, such as the totalitarian state, class-dictatorship", and, "the subtlest of all, scientism or worship of facts." In the wake of the reaction against this rationalistic individualism and legal positivism, the author finds definite manifestations of a new trend discernible. He calls it the trend toward "personalism", the revival of the natural-law philosophy centered on the dignity of man. He hopes that "this resurgence of spiritual idealism is more than a temporary fashion, that it is the beginning of a truly glorious age in the history of jurisprudence."

In the second part of his book (pp. 155-235), Professor Wu makes an attempt to reveal the often neglected facet of Christ's personality, namely, "His intimate relation to law." Christ, the "Judge of Judges", the "Alpha and the Omega", sums up the spirit of the law in the Golden Rule: "Do to other men all that you would have them do to you." He leads the way on "the paths of equity". To Him and His Apostles, "the letter kills while the spirit gives life." To Him, "laws are made for man, not man for the laws."

The author realizes that human laws have not embodied the tenets of Christ as yet in all their "breadth and depth". He feels, however, that the mere fact that they cannot be attained overnight, does not justify their dismissal from jurisprudence: "The changes must continue upwards until the standards of Christ shall be universally accepted." Where the common law is at its best, the author is convinced that "Christ Himself would have smiled upon its judgments." From the days of Bracton to contemporary America, the common law judges have often drawn their inspiration from His words, just as the judges of ancient China would quote Confucius. But just as it is impossible to appraise the old Chinese jurisprudence without a knowledge of Confucianism, so it is impossible to understand the underlying spirit of the common law without taking account of the subtle but permeating influence of Christianity. The source of the common law is "in the wellsprings of Christian prudence and justice, wisdom and love." The two great systems of jurisprudence in the world have both been "pupils in the school of Christ". They are similar in that "both nature and grace have co-operated in their making." Professor Wu feels that it is up to the younger generation of jurists to build up a truly fundamental legal philosophy "by resorting to the very fountains of the common law, the spirit and teachings of Christ."

The last section, the Epilogue (pp. 236-271), is devoted to the art of law. The author sees the essence of law in "justice, which all existing laws should endeavor to embody as perfectly as possible." The concepts of truth, the good and the beautiful all enter into the art of law. "For a law or a judgment to be just, it must be *based upon* the true, it must *aim at* the good, and finally, it must *be* beautiful."

The general theme of Professor Wu's book is no doubt highly inspiring. Using his Christian philosophy as a standard of measurement, it would be interesting, though undoubtedly less inspiring, to take an excursion into the different national legal systems to see the number of positive rules of law that might fail to qualify as more than mere "corruptions of law." Such a survey, reflecting the true meaning, aim and application of the respective positive laws, might reveal not only the complete lack of a just legal system but might also be indicative of the extent of illegality in the oper-

ations of law-making and enforcing bodies and elite groups.[1] Such a survey, itself, might constitute the strongest denial of the true statehood character of the entity involved. The inference, if carried to its logical conclusion, would entail far-reaching implications and changes in the present-day practice of the law of recognition, diplomatic intercourse, admission of states to international organizations, and many other related fields. Whether and to what extent the author is aware of these implications is not entirely clear from the monograph.

Apart from frequent repetitions and the lack of a clear dividing line between much of the material presented in the first and second parts, Professor Wu's book, on the whole, furnishes an enlightening reading assignment not only to the specialist but to the general reader as well.

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[1] *Cf.* Gorove, *"The New Polish Constitution,"* 1954 WASH. UNIV. LAW Q. 261-282.